

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT No. 194 16 9653-D3
Issued to: August W. BERGER

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2403

August W. BERGER

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.30-1.

By order dated 23 April 1984, an Administrative Law Judge of the United States Coast Guard at Philadelphia, Pennsylvania, suspended Appellant's merchant mariner's document for one month upon finding him guilty of misconduct. The specifications found proved allege that while serving as Ordinary Seaman aboard the SS TYSON LYKES, on or about 22 March 1984, while said vessel was departing the port of Honolulu, Hawaii, Appellant deserted said vessel and on the same date Appellant wrongfully created a disturbance on said vessel's bridge thereby interfering with the safe navigation and undocking of the vessel while in restricted waters.

The hearing was held at Philadelphia, Pennsylvania, on 19 April 1984.

At the hearing, Appellant elected to represent himself and entered a plea of not guilty to the charge and specifications.

The Investigating Officer introduced in evidence nine exhibits.

In defense, Appellant testified in his own behalf.

At the end of the hearing, the Administrative Law Judge announced orally that he found the charge and two specifications proved. He ultimately rendered a written Decision and Order on 23 April 1984 in which he concluded that the charge and two specifications had been proved and suspended Appellant's merchant mariner's document for a period of one month.

The Decision and Order was served on 23 April 1984. Appeal was timely filed and perfected on 22 May 1984.

FINDINGS OF FACT

Appellant was serving as Ordinary Seaman aboard the SS TYSON LYKES under authority of his document on 22 March 1984 while the SS TYSON LYKES was preparing to depart the port of Honolulu, Hawaii.

At 1850 on 22 March 1984, the Master observed Appellant standing at the head of the starboard gangway accommodation ladder, which was in a raised position and secured for sea. Appellant was shouting at and gesticulating to the Chief Officer, Mr. Case. Respondent threw his suitcase over the side of the vessel onto the dock. At 1855, while the vessel was singling up fore and aft in preparation to get underway, Appellant came to the starboard wing of the bridge. The Master, the Pilot, and the Helmsman were on the bridge. Appellant shouted at the Master that he must be allowed to go ashore immediately. The Master told Appellant that "his duties were on the stern with the deck gang letting go and that he had to leave the bridge at once because he was interfering with the safe navigation of the vessel while it was undocking in restricted waters." Appellant replied that he did not give a (profanity) for the Master and the vessel and that if he was not allowed to disembark he would go over the side on a line, as he left the bridge.

Shortly thereafter, the Master observed Appellant rigging a gantline and ordered the Chief Officer on the walkie-talkie not to allow Appellant to attempt to go over the side hand-over-hand on a line, since he might injure himself. Appellant went over the starboard side of the vessel on the pilot ladder from which he jumped to the dock. He retrieved his suitcase and began walking in the direction of the gate. At 1900 the last mooring line was off of the dock and the vessel proceeded to sea bound for Long Beach, California.

The Master made detailed entries in the Official Logbook regarding his observations of Appellant's actions. At the beginning of the hearing, the Administrative Law Judge also informed Appellant that if there were any witnesses which he wished to call, he should give their names and addresses to him and he would issue subpoenas. He also instructed Appellant that the testimony of witnesses beyond one hundred miles of the City of Philadelphia could be taken by deposition. Appellant neither objected to the introduction of the logbook entries nor asked that additional witnesses be subpoenaed.

In his own testimony, Appellant claimed that he was allowed to leave the ship by mutual consent because he was in need of medical attention and the Master did not want to do the necessary paper work to obtain such treatment for him at that time. He further stated that the Chief Mate assisted him in leaving the ship by operating the pilot ladder to lower him to the dock.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends that the findings of the Administrative Law Judge must be reversed because:

1. The Government's case was entirely documentary;
2. The accuracy and veracity of these documents is questionable;
3. The authors and custodians of these documents were persons with adverse interests;
4. The authors and custodians of these documents did not testify in person and it was not possible to observe their demeanor or cross-examine them;
5. There are clear errors in the record to warrant the dismissal of all charges against Appellant; and
6. On its face, the Government has failed to prove desertion.

APPEARANCE: Bernard Sacks, Esq., Sacks, Basch & Lavner, Philadelphia, Pennsylvania.

OPINION

I

Appellant first asserts that the findings of the Administrative Law Judge should not be affirmed because the Coast Guard's case was entirely documentary. I do not agree.

Appellant cites no authority for the proposition that the case may not be proved by documents alone. I note that in this case the documents relied on were those specifically admissible under 46 CFR 5.20-106 and 46 CFR 5.20-107. Consequently, I find no error here.

II and III

Appellant complains that the accuracy and veracity of these documents is questionable and the authors and custodians were persons with interests adverse to his. I find no cause to reverse here.

Again, Appellant cites no authority in support of his proposition.

The accuracy of admissible documents is a question of fact to be resolved by the Administrative Law Judge. The fact that the authors and custodians of the documents may have been persons with interests adverse to Appellant's is merely one of the factors which may be considered by the Administrative Law Judge in deciding whether to believe the documents or not.

I have consistently held:

"It is the function of the Administrative Law Judge to resolve conflicts in testimony and issues of credibility. The question of what weight to accord the evidence is committed to the discretion of the Administrative Law Judge, and will not be set aside unless it is shown that the evidence he relied upon is inherently incredible."

Appeal Decision 2357 (GEESE), aff'd NTSB Order No. EM-119 of 17 May 1985. See also Appeal Decisions 2333 (AYALA), and 2302 (FRAPPIER). I am unable to conclude that the determination of the Administrative Law Judge to believe the detailed entry made by the Master in the Official Logbook concerning events which he personally observed (rather than Appellant's testimony) was inherently incredible. Therefore, his findings based on that entry will not be disturbed.

IV

Appellant complains that the authors and custodians of the various documents introduced against him did not testify in person so that he could cross examine them and so that their demeanor could be observed. Appellant may not now complain, since he failed to request these witnesses when given the opportunity at the hearing.

At the outset of the hearing the Administrative Law Judge told Appellant that he could request that additional witnesses be called. Nevertheless, the record does not show, and Appellant does not claim, that he ever requested that the authors and custodians of the documents be called as witnesses. These documents, portions of the Official Logbook and Shipping Articles, are admissible under the applicable regulations, 46 CFR 5.20-106, 107. Appellant has cited no authority to support the proposition that the authors and custodians must be produced as witnesses where not requested. I find no error here.

V

Appellant asserts that there are clear errors in the record to warrant dismissal of all charges against Appellant. I do not

agree.

Appellant does not state what the errors in the record are nor provide citations to authority or references to specific portions of the record in support of his contention as required by 46 CFR 5.30-1(e). Since the errors of which Appellant complains are not on the face of the record, they form no basis to set aside the findings of the Administrative Law Judge.

VI

Appellant asserts that the Coast Guard has failed to prove desertion. I do not agree.

In support of this contention, Appellant argues: first, the Coast Guard has not established the element of intent to not return to the ship, and, second, he was justified in deserting the vessel because he needed medical attention. Appellant reasons that the fact that he left many of his personal belongings, including a considerable amount of case, aboard the vessel precludes the finding that he intended not to return. With respect to his medical condition, Appellant asserts that he had been having trouble breathing and needed some spray to open up his lungs. This is a problem that he had experienced previously.

The fact that Appellant left his personal belongings aboard the vessel is only one of the factors that the Administrative Law Judge may consider in determining whether or not Appellant intended to return to the vessel. It is clear from the evidence, and apparently uncontested, that Appellant left the vessel as it was getting underway for sea to continue its voyage. There is also evidence to show that Appellant made a statement to the Master just prior to leaving that he didn't care about the vessel or the Master. Considering these factors, together with all the circumstances of this case, I am unable to say that the Administrative Law Judge's determination that Appellant deserted the vessel was unreasonable or inherently incredible.

Whether or not Appellant's medical condition justified leaving the ship is also a question of fact to be determined by the Administrative Law Judge. While Appellant may have asserted a need for medical attention at the time, it is also clear that the illness which he claims was one which he had suffered from before and, presumably, would know how to control. By his own testimony, he did not go directly to a doctor in Hawaii, but waited until he had returned to California. Considering these factors, I am unable to conclude that the Administrative Law Judge's conclusion that Appellant had deserted the vessel was unreasonable.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with applicable regulations.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 23 April 1984 is AFFIRMED.

B. L. STABILE
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 7th day of August, 1985.